No. 96-1959

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IN THE

Supreme Court of the United States

October Term, 1996

MARGARET MAYER, individually and as Executrix of the ESTATE OF JAMES E. MAYER, Deceased,

Petitioner,

against

CORNELL UNIVERSITY and LAURA BROWN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Should this Court grant certiorari to review a circuit court's interpretation of the Death on the High Seas Act and the availability of an accompanying survival action if the outcome of the case would not change even if all the issues in the petition were to be resolved in Petitioner's favor because, in rulings not challenged in the petition, and which are wholly dispositive of the petitioner's claims, the courts below found as a matter of law that Respondents owed no duty to Petitioner and her descendent?

2. Should this Court grant certiorari to review a circuit court's determination that the locus/maritime nexus Executive Jet test for admiralty jurisdiction is not required when a controlling statute, like DOHSA, applies, when this Court has already confirmed that position in Offshore Logistic, Inc. v. Tallentire?

3. Should this Court grant certiorari to review a circuit court's holding that a survival action based on general maritime law, rather than state law, is available to accompany a DOHSA-based wrongful death action when there is little conflict amongst the circuit courts and this Court has repeatedly declined opportunities to rule on this issue?

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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MARGARET MAYER, individually and as Executrix of the ESTATE OF JAMES E. MAYER, Deceased,

Petitioner,

vs.

CORNELL UNIVERSITY and LAURA BROWN,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

REASONS FOR DENYING THE PETITION

I. Errors, if any, in the courts' rulings below do not effect the outcome of this case.

The district court below held that Respondents Cornell University and Laura Brown did not owe a duty to Petitioner Margaret Mayer or her deceased husband, James Mayer. Memorandum-Decision and Order of the District Court, Entered April 15, 1996 at A-197-198. In a de novo review of the issue (A-11), the Second Circuit reached the same conclusion, holding that Respondents owed no duty to Petitioner or Petitioner's decedent. Summary Order of the Court of Appeals, Entered January 8, 1997 at A-11-21. This

finding, which Petitioner not only does not challenge, but completely ignores in the petition, is totally dispositive of Petitioner's action in its entirety.[1] Whether analyzed under state or federal law and, regardless of whether Petitioner had a right to jury trial, the finding of no legal duty wholly undermines all of Petitioner's claims for relief and renders them moot.

While ignoring this fatal flaw in her claims of error, Petitioner does focus on abstract issues of law, asking this Court to address issues arising under the Death on the High Seas Act ("DOHSA") which, even if decided wholly in her favor, would not affect the lower courts' determination that Respondents did not owe Petitioner or Petitioner's decedent any legal duty. Thus, Petitioner now seeks review of the determinations that 1) DOHSA (and admiralty jurisdiction) applied to her wrongful death claim, and 2) that the accompanying survival action is a maritime law-based claim in admiralty, rather than a state law-based claim in diversity.

In short, Petitioner believes that if the jurisdictional issues had been resolved in her favor, she would have been entitled to have a jury hear either one or both of her claims at trial. Yet even if this Court were to find in Petitioner's favor, that is to say that: 1) admiralty jurisdiction did not apply to the wrongful death claim; and 2) the survival action was a state law-based claim in diversity, the outcome of the case would be no different. If the case had been heard by a jury, the determination that the Respondents owed no duty as a matter of law would have still been decided by a judge, and the case would still have been dismissed on that ground. Thus, even if the Second Circuit erred in finding that admiralty jurisdiction, and specifically DOHSA, applied in the present case, these were harmless errors which did not affect the outcome of the case. See, e.g., Flournoy v. Weiner, 321

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[1] Petitioner's time to challenge the lower courts' rulings concerning the lack of duty has expired. Sup. Ct. R. 13 and 14(1)(a). The lower courts' determinations of this issue are now final. Even if Petitioner had challenged these rulings, the only basis for review would have been the disfavored argument that the lower courts misapplied a properly stated rule of law. See, S.Ct. R. 10 and Palmer v. Hoffman, 318 U.S. 109, 118 (1943).

U.S. 253, 262 (1944) [quoting Murdock v. City of Memphis, 20 Wall. 590, 634, 635 (1874)]: "[T]his Court has said that it will not enter a 'useless and profitless reversal where the same judgment will be rendered by the court below . . .' For like reasons we have refused to answer questions certified to us by a lower federal court where it appears that the answer cannot affect the result." See also Hirabayashi v. United States, 320 U.S. 81, 85 (1943), Lindheimer v. Illinois Bell Tel. Co., 292 U.S. 151, 176 (1934), New York Tel. Co. v. Maltbie, 291 U.S. 645 (1934), and City of New Orleans v. Emsheimer, 181 U.S. 153 (1901).

Respondents respectfully submit that this Court should not grant certiorari to decide abstract principles of law in a case in which the outcome will be unaffected by the Court's decision.

II. The test for admiralty jurisdiction has been clearly and repeatedly articulated by this Court and does not need further review.

A. As this Court found in Executive Jet, and reiterated in Tallentire, DOHSA confers admiralty jurisdiction independent of the two-prong (locus/nexus) Executive Jet test.

The Petitioner argues that the Court of Appeals for the Second Circuit erred in upholding the district court's finding that the first cause of action of the complaint, alleging "negligence, gross negligence or recklessness" was governed by the Death on the High Seas Act ("DOHSA"). 46 U.S.C. § 761. et seq. [2]

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[2] DOHSA, in relevant part, reads:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in

The Petitioner argues that this case should not have been heard as a DOHSA case in admiralty because it does not satisfy the criteria set forth in Executive Jet Aviation, inc, v. Cleveland, 409 U.S. 249 (1972). Petitioner's Brief at 8-13. Mayer argues that the accident in the case at bar does not have a "traditional maritime nexus" so as to satisfy the second prong of a two-prong (locus/nexus) test.

Mayer contends that the Second Circuit in the case at bar and district courts in the Second Circuit have improperly interpreted the explicit language in Executive Jet that emphasizes that the two-prong test is not necessary in cases in which there is clear statutory authority for admiralty jurisdiction (i.e. DOHSA). Executive Jet, 409 U.S. at 268, 271 n. 20, and 274 n.26; accord, Friedman v. Mitsubishi Aircraft International, Inc., 678 F. Supp. 1064 (S.D.N.Y. 1988); Kunreuther v. Outboard Marine Corp. 757 F. Supp. 633 (E.D.Pa. 1991).[3]

Despite the clear language of Executive Jet, the Petitioner argues that the circuits are in conflict as to whether the two-prong Executive Jet test is a predicate for admiralty jurisdiction in DOHSA cases. To support her position, Mayer cites to Miller v. United States, 725 F.2d 1311 (11th Cir.), cert. denied, 469 U.S. 821; and Kuntz v. Windjammer "Barefoot" Cruises, Ltd., 573 F.Supp. 1277 (W.D.Pa. 1983), aff'd 738 F.2d 423 (3d Cir.), cert. denied, 469 U.S. 858. In both cases the court applied the two-prong test and found that the requirements were met. However, both cases relied upon by Petitioner predate this Court's reiterations of its Executive Jet standard.

> admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. § 761.

[3]It is undisputed in the case at bar, that the accident occurred in navigable waters well beyond one maritime league from the shore of any state, territory or dependency. See Petitioner's Brief at 19.

In Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986), this Court reiterated its Executive Jet determination that if DOHSA applies by virtue of the location of the accident, then no further test is needed to find admiralty jurisdiction. As this Court explained: "[A]dmiralty jurisdiction is expressly provided under DOHSA because the accidental deaths occurred beyond a marine league from shore." Tallentire, 477 U.S. at 218 (DOHSA applied because deaths occurred when helicopter carrying drilling platform workers crashed on the high seas thirty miles off the Louisiana coast).

The court in Palischak v. Allied Signal Aerospace Co., 893 F. Supp. 341, (D.N.J. 1993), explained the application of the two-prong test this way:

> Any confusion on this issue was cleared up when the Supreme Court issued its decision in Offshore Logistics, Inc. v. Tallentire (citation omitted). In Tallentire, the court made clear that admiralty jurisdiction is expressly provided under DOHSA whenever the accidental death occurred more than a marine league off shore. Id. at 218.

The alleged conflict amongst the circuits which Petitioner argues as a basis for this Court to grant her petition for certiorari is wholly illusory. This issue has in fact been resolved by more recent decisions of this Court. This Court has clearly explained the test in Executive Jet and has since confirmed the application in Tallentire. No further review of this issue is necessary.

B. This Court's holding in Rodrigue is readily distinguishable and is not in conflict with the Second Circuit's ruling in the instant case.

In Point II of her brief (Petitioner's Brief at 14-15), Petitioner claims that the Second Circuit's decision in this case is in conflict with this Court's decision in Rodrigue v. Aetna

Casualty and Surety Co., 395 U.S. 352 (1969). Petitioner then provides a tortured interpretation of Rodrigue in a feeble effort to make her point. However, Rodrigue is readily distinguishable on its facts, and is not in conflict with the Second Circuit's decision in the present case.

In Rodrigue, this Court held that the Outer Continental Shelf Lands Act ("OCSLA"), and not DOHSA, applied in the case of two deaths which had occurred on an artificial drilling platform. Petitioner tries to argue that the holding in Rodrigue supports her claim that the location of the accident alone does not yield DOHSA-based admiralty jurisdiction. Yet as this Court knows, and the Petitioner ignores, the location of the accident in Rodrigue (the drilling platform) is exempted from admiralty jurisdiction by OCSLA:

> The intent behind OCSLA was to treat the artificial structures covered by the Act as upland islands or as federal enclaves within a landlocked State, and not as vessels, for the purposes of defining the applicable law because maritime law was deemed inapposite to these fixed structures. See Rodrigue (citation omitted). This Court endorsed the congressional assumption that admiralty law generally would not apply to the lands and structures covered by OCSLA in Rodrigue, noting that accidents on the artificial islands covered by OCSLA 'had no more connection with the ordinary stuff of admiralty than do accidents on piers.' Id. at 360.

Tallentire, 477 U.S. at 217. In Tallentire, where the accident occurred in the water, and not on an artificial drilling structure, this Court held that "[h]ere, admiralty jurisdiction is expressly provided for under DOHSA because the accidental deaths occurred beyond a marine league from shore." Id. at 218.

In Rodrigue, DOHSA and admiralty jurisdiction did not apply because the accidental deaths had occurred on artificial drilling platforms, a locale exempted from admiralty jurisdiction under OCSLA. The death at issue

in the present case occurred in the water, not on land (real or artificial). Hence Rodrigue has no relevance to the case at bar and no review is warranted.

C. The Second Circuit correctly held that even if DOHSA claims require a nexus to traditional maritime activity, Petitioner's claim meets the requirement.

Petitioners ask this Court to review the Second Circuit ruling that:

> [E]ven if DOHSA claims require a nexus to traditional maritime activity, appellant's claim meets the requirement. The accident occurred in navigable waters in the course of activities connected with a maritime commercial undertaking, ocean touring of passengers.

Summary Order of the Court of Appeals, Entered January 8, 1997, at A-19-20. Petitioner contends that the finding of a maritime nexus conflicts with this Court's reasoning in Sisson v. Ruby, 497 U.S. 358 (1990) and its progeny.

As an threshold issue, this Court ought not consider this issue because it seeks review of a purported misapplication of a rule of law to the facts at bar. Rule 10 of the rules of this Court explain:"[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law" (emphasis added). Even if the two-prong test ought to be applied, the application of that test to the facts in the case is not a proper subject for this Court's review.

However, assuming, arguendo, that the two-prong test of Executive Jet is required, and assuming that the issue of its application to the facts in this case is appropriate for this Court's consideration pursuant to its rules, the Second Circuit did not err in concluding that the present case meets both the location and nexus prongs of the test.

First, as the Petitioner concedes (Petitioner's Brief at 19), the locus test is clearly satisfied as the incident occurred in navigable waters some 8-13 miles off the coast of Costa Rica.

Second, the activity engaged in at the time was a maritime commercial venture. The tourists, including the Mayers, were paying guests at the Marenco Biological Station. The boat trip was on an ocean-going boat, which was owned and operated by Marenco for the benefit of their paying guests. See Findings of Fact in the Memorandum-Decision and Order of the District Court, Entered April 15, 1996 at A-84-117. As the Second Circuit characterized the activity: "[t]he accident occurred in navigable waters in the course of activities connected with a maritime commercial undertaking, ocean touring of passengers." Summary Order of the Court of Appeals, Entered January 8, 1997, at A-20.

The inquiry regarding whether a maritime nexus exists must focus on the general nature of the activity at issue, not the particulars of the single incident. See Sisson v. Ruby, 497 U.S. 358 (1990). Petitioner's Brief is devoid of caselaw to support her claim that the snorkeling activity does not satisfy the "nexus" requirement. Indeed, a number of cases decided prior to the present case have recognized that similar activities satisfy the nexus requirement. See Kuntz v Windjammer "Barefoot" Cruises, 573 F.Supp. 1277 (nexus test is satisfied where cruise ship passenger drowned while on a scuba diving excursion); Moyer v. Rederi, 645 F.Supp. 620 (S.D.Fla. 1986) (nexus test is satisfied where cruise ship passenger suffered heart attack while on a snorkeling expedition).

Again, without caselaw to substantiate her argument, Petitioner contends in a conclusory fashion that all of this is irrelevant because Respondents' alleged negligence was "land-based" and thus does not satisfy the maritime nexus requirement.[4] Contrary to Petitioner's baseless position,

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[4] To support this position, Petitioner for the first time concedes that Respondents did not control the boat or the snorkeling activity whatsoever. Petitioner's Brief at 18-19. It is ironic that, now, apparently because it suits her purposes, Petitioner concedes this fact, when, from the very beginning of this case, she has argued exactly the opposite. And still, she

numerous courts sitting in admiralty jurisdiction have determined that the "land-based" activities of defendants satisfy the nexus requirement. See, e.g., Miller v. United States, 725 F.2d 1311.

This court should not review the issue because Petitioner seeks review of the Second Circuit's application of established law to the facts in the case. Moreover, even if the satisfaction of the locus/nexus test were a prerequisite for admiralty jurisdiction, the Second Circuit correctly held that the test was satisfied. Petitioner has offered no caselaw, other authority, or a well-reasoned argument which contradicts that holding.

III. There is insufficient conflict amongst the circuits to warrant this Court's review of whether a state law-based survival action may accompany a DOHSA-based wrongful death claim.

In Points V and VI, (Petitioner's Brief at 20-30), Petitioner claims that the position of the Second Circuit is in direct conflict with that of the Third Circuit regarding the availability of a state law survival action when the companion wrongful death action is governed by DOHSA. Petitioner also argues that the Second Circuit position on this issue conflicts with decisions of this Court.

Of the three Third Circuit cases cited by Petitioner, one court did not even consider the issue. The rulings of the other two cases are in conflict with the position adopted by the First, Second, and Fifth Circuits, and other numerous district courts regarding companion state survival actions.[5] These two

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wants to have it both ways: in the facts set forth in this petition, she still insinuates that Cornell and Brown had control over the snorkeling activity. (i.e. "Rosenberg and Brown decided that he would stay on the boat, and Brown would go into the water with the snorkelers." Petitioner's Brief at 4).

[5] See, e.g., Preston v. Frantz, 11 F.3d 357 (2d Cir. 1993), cert. denied 115 S. Ct. 1060 (1994); Wahlstrom v. Kawasaki, 4 F.3d 1084 (2d Cir. 1993), cert. denied 510 U.S. 1114, 114 S. Ct. 1060 (1994); Azzopardi v. Ocean

cases alone do not create sufficient conflict to warrant this Court's review of this issue.

In the first case relied on by Petitioner, Dugas v. National Aircraft Corp, 438 F.2d 1386 (3d Cir. 1971), the appellate court considered whether DOHSA provided the exclusive remedy for recovery and consequently precluded any survival action. The court, after going to great lengths to explain that wrongful death actions and survival actions are distinct causes of action, held that DOHSA did not preclude the survival action based on state law. Importantly, the Dugas court did not focus on whether a state law-based survival action versus a general maritime law-based survival action could be brought by a DOHSA plaintiff. Instead it considered only whether any survival action was precluded by DOHSA. It never pondered the question at issue here, whether a general maritime law-based survival action, rather than a state law-based claim, is appropriate when the accompanying wrongful death action is governed by DOHSA.

In the second case cited by Petitioner, the district court in Kuntz v. Windjammer "Barefoot" Cruises Ltd., 573 F.Supp. 1277, 1286, explained that:

> In summary we hold that a survival action based on state law may be prosecuted with a claim under DOHSA in this circuit pursuant to Dugas v. National Aircraft Corporation, and post-Moragne, a survival action based on general maritime law may be coupled with a DOHSA claim for wrongful death.

The Kuntz court then reasoned that its "fidelity to the common law tradition" required it to follow Dugas and so it applied the Pennsylvania survival statute to the plaintiff's claim. Id. Interestingly, the Kuntz court noted that, "[w]e wish to point out that even if our decision to follow Dugas and apply the Pennsylvania Act is erroneous, the error is of no consequence because the same damages are recoverable in a survival action

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Drilling and Exploration Co., 742 F.2d 890 (5th Cir. 1984); Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974).

based on maritime law following the decision in Moragne." Id.

More recently in the Third Circuit, the district court in Palischak v. Allied Signal Aerospace Company, 893 F.Supp. 341 (D.N.J. 1995), reviewed the evolution of the Third Circuit's position on this issue and found it lacking. In Palischak, the plaintiff brought claims for conscious pain and suffering under the New Jersey survival statute and, in the alternate, under general maritime law. After citing to a long list of district court and circuit court decisions which recognize a general maritime law-based survival action, the Palischak court concluded that it was bound by Dugas and Kuntz to apply the state law. "Therefore, although we feel the better view is that the survival action arises from general maritime law, based on Dugas and Kuntz, we will apply the New Jersey Survival Act." Id. at 349. Plainly, Petitioner's argument at bar does not warrant Supreme Court review, as even a district court in the Third Circuit recognizes that the better position on this issue is the one held by the First, Second, and Fifth Circuits, rather than the one held by its own Third Circuit.

Petitioner's contention that the Second Circuit's position conflicts with decisions of this Court is similarly without merit. Petitioner's Brief at 23-30. Relying primarily on this Court's decision in Yamaha Motor Corp. et al. v. Calhoun, _U.S._, 116 S.Ct. 619 (1996), the Petitioner claims that the Second Circuit erred "in failing to recognize that Yamaha completely vitiates its holding in Preston." Petitioner's Brief at 28. This is simply false. Preston was a DOHSA case, whereas Yamaha considered the applicability of state law actions when accidents occur within territorial waters, not on the high seas.

The Yamaha court granted certiorari to consider whether the federal maritime claim for wrongful death recognized in Moragne supplies the exclusive remedy in cases involving the death of nonseamen in territorial waters.[6] The

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6 "We attempt no grand synthesis or reconciliation of our precedent today, but confine our inquiry to the modest question whether it was Moragne's

distinction is a crucial one because, as this Court has recognized, states retain an interest in regulating activities in their territorial waters and federal maritime law has long accommodated those interests. The holding in Yamaha simply preserves the application of state statutes to deaths occurring in territorial waters, it has no application or relevance in cases such as the present one in which the death occurred on the high seas.

Petitioner fails to identify any Second Circuit decisions which conflict with decisions of this Court on the issue of the application of general maritime law survival claims rather than state law-based survival claims in DOHSA actions. Indeed, this Court expressly declined to decide this issue in Tallentire. Petitioner has failed to present any compelling reason why this Court should consider the issue now.

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design to terminate recourse to state remedies when nonseafarers meet death in territorial waters." Yamaha at footnote 8.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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